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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 564

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION,

*Petitioner,*

*vs.*

PINKERTON'S NATIONAL DETECTIVE AGENCY, INC., A CORPORATION,

*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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MAY IT PLEASE THE COURT:

Respondent files this brief in opposition to the Petition of Fidelity and Deposit Company of Maryland for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and intends to answer all of the assigned errors specified therein.

**Factual Statement.**

At the outset we desire to supply certain deficiencies in, and correct certain unfounded inferences from, Petitioner's statement of the facts.

The Escrow Agreement entered into between Respondent and the Illinois Industrial Commission, contrary to the inference sought to be raised by Petitioner, provided that the Treasury Bond deposited by Respondent in order to qualify as a self-insurer under the Illinois Workmen's Compensation Law was to be held by the Commission "as a guarantee for the payment of any judgments entered against the said [Respondent] for the payment of any sums found by process of law to be due to the employees of the said [Respondent] under a law of the State of Illinois, known as the Workmen's Compensation Law * * *," and that said Treasury Bond was to be held until Respondent should request its return and establish by certificate of the Commission that no such payments were due and unpaid (R. 35-36).

During the period from August 9, 1935, until May 24, 1941, Petitioner remained and was accepted as a self-insurer upon the basis of the aforesaid deposit (R. 11, 17). On May 24, 1941, it secured an appropriate compensation insurance policy and filed evidence thereof with the Industrial Commission (R. 11, 17). This insurance was obtained to take the place of the aforesaid deposit in escrow.

Thereupon, Petitioner requested the return of the Treasury Bond deposited as aforesaid and, on July 22, 1941, was informed by the Chairman of the Commission that it was a rule of the Commission that collateral was to be held one year from the effective date of the insurance policy since injured employees could file claims within that period,

and that the collateral would be released to Respondent on May 24, 1942, if at that time there were no claims, awards or judgments of the Commission against Respondent (R. 17).

Petitioner made several demands for the return of said Treasury Bond, which were refused (R. 12), and on or about January 30, 1942, was first informed by representatives of the Commission that said Treasury Bond was missing (R. 12). On March 5, 1942, Petitioner was informed by L. J. O'Connell, Chief Security Examiner of the Commission, that in the early part of 1937 he had pledged said Bond for a personal loan in the amount of $2,000, that said loan was later increased to $10,000, and that subsequently said Bond was sold by the pledgee and the balance of the proceeds remitted to O'Connell (R. 12-13).

## ARGUMENT.

### I.

### No Genuine Issue as to a Material Fact Was Presented by the Motions for Summary Judgment or Decided by the Circuit Court of Appeals.

Petitioner places primary reliance for the granting of the writ of certiorari in the assertion that the Circuit Court of Appeals, in contravention of Rule 56 of the Federal Rules of Civil Procedure, has decided a genuine issue of material fact. This attack is aimed at the holding of that Court that the acceptance of the deposit of security made by Respondent to guarantee the payment of compensation awards which might be entered against it was within the scope of the official duties and powers of the Chief Security Examiner of the Illinois Industrial Commission.

To prevent possible confusion in the minds of the members of the Court, and to explain the division and arrangement of this brief, we point out that Petitioner presents two arguments in connection with the official duties and powers of L. J. O'Connell as such Chief Security Examiner. It is asserted that he acted without authority in accepting the deposit of security from Respondent because (a) the Industrial Commission had no power in law to accept such deposits of security or to require that they be made with the Commission itself, and (b) assuming that the Commission had such power, "it was not a part of O'Connell's duties to receive collateral deposited by Pinkerton or other employers seeking to become self-insurers * * *" (Br. 10).

The first of said questions is conceded by Petitioner to be a question of law, within the power of the Circuit Court of Appeals to decide (Br. 10), and it is answered under

the second subdivision of this brief (ante, p. 10). It is the second of the aforesaid contentions that Petitioner claims is a question of fact, which is material and as to which a genuine issue exists. This we deny.

**(a) The definition of the duties of the Chief Security Examiner of the Illinois Commission is a question of law.**

The duties of the Chief Security Examiner have been officially described and classified by the Illinois State Civil Service Commission. That body was created by statute and charged with the duty to "classify all the officers and places of employment in the State service, except as provided in Section 11 of this act, with reference to the duties thereof, for the purpose of establishing grades and for the purpose of fixing and maintaining standards of examinations hereinafter provided for." (Section 3 of State Civil Service Act, prior to amendment of June 30, 1943 Illinois Revised Statutes, 1942, Ch. 24½, Par. 3.) It also has the power to make and publish rules (Sections 4 and 5, Illinois Revised Statutes, 1943, Ch. 24½, Pars. 6 and 7). Pursuant to the aforesaid duty and authority, said Civil Service Commission, in an Examination Notice, Volume 1938, Series 2, Paragraph 39, defined the duties of the Chief Security Examiner of the Industrial Commission as follows:

> "DUTIES: Under the supervision of the Secretary and Chairman of the Industrial Commission, to receive, examine, and determine the adequacy of all securities deposited with the Industrial Commission under the provisions of the Workmen's Compensation Law; to supervise examiners and clerical force, and to perform other duties as assigned. Examples: To receive securities furnished by employers who may elect to carry their own risks under the Workmen's Compensation Law; to make investigations of the value of such securities and determine whether they are adequate to the risks involved; * * * to have charge of all securities assigned to his care; * * *."

We submit that, upon the basis of the foregoing, the Circuit Court of Appeals could hold, *as a matter of law*, that the receipt of Respondent's security was within the scope of the authority and official duties of said Chief Security Examiner.

**(b) If such definition were a question of fact, the fact is not material.**

If we assume, for argument, that the determination of the duties and authority of said Chief Security Examiner presented a question of fact, Petitioner's position is no stronger. The precise extent of that officer's authority or the exact delineation of his duties is not material to the determination of the rights of the parties. He accepted the deposit of Respondent's Treasury Bond under color of, and by virtue of, his office. That is sufficient to impose upon his surety, the Petitioner, liability for Respondent's loss.

This follows from the general rule stated in 46 Corpus Juris 1069:

> "In some cases it is laid down as a general proposition that sureties on an official bond are only liable for acts of the principal done by virtue of the office, and cannot be held responsible for acts done merely by color of office. In other cases the distinction has been repudiated, and the more general rule would seem to be that for improper acts performed by an officer under color of his office, the sureties upon his bond can be held liable, although this rule is subject to the qualification that in order to constitute color of office such as will render an officer's sureties liable for his wrongful acts, something else must be shown beside the fact that in doing the act complained of the officer claimed to be acting in an official capacity."

That rule has been adopted by the courts of Illinois and is applicable to the instant case.

In *People, for use, etc.*, v. *Brown*, 194 Ill. App. 246, the action was brought on the bond of a County Clerk. It was contended by the surety that the act of the County Clerk in issuing county warrants or orders payable to himself did not constitute an official act. The Court said (page 250):

> "We are of the opinion that any person injured by the official act of an officer is protected by such officer's bond.
>
> "The next question to be considered is: Were the acts of the County Clerk Brown in the issuing of the warrants or orders and selling of the same official acts? We do not believe that the act of negotiating and selling the warrant was an official act, but we are of the opinion that the act of issuing the warrant or order purporting to be issued by order of the board of supervisors, and the attaching of the seal to the order was an official act. *'By an official act is not meant a lawful act of the officer. * * * It means any act done by the officer in his official capacity, under color and by virtue of his office.' Turner* v. *Sisson*, 137 Mass. 191; *Horan* v. *People*, 10 Ill. App. 21; Mechem on Public Officers, sec. 284, and authorities cited in notes. *The object of requiring official bonds is to obtain indemnity against the use of an official position for wrongful acts done under color of office. People* v. *Treadway*, 17 Mich. 480; *Campbell* v. *People*, 154 Ill. 601." (Italics supplied.)

In *People for the use of Johnson* v. *Morgan*, 188 Ill. App. 250, the Court said at page 251:

> "Official acts in the performance of the duties of an office do not mean simply the lawful acts of the officer holding that office, but include all acts done in his official capacity under color and by virtue of said office. *Campbell* v. *People*, 154 Ill. 595. The object of requiring official bonds is to obtain indemnity against the use of the office. *Greenberg* v. *People*, 225 Ill. 174. The bond of a city treasurer is governed by the above section of the statute, which includes all city and village officers, and in the case of *City of East St. Louis* v. *Flannigan*, 26 Ill. App. 449, it was held that the

> sureties of the treasurer's bond were liable to a third person damaged through the unlawful acts of the treasurer done in his official capacity by virtue of his office."

It is conceded that O'Connell held the office of Chief Security Examiner of the Industrial Commission, the body charged with the administration of the Workmen's Compensation Law, and that in all things material he purported to be acting in that capacity and in the name of the Commission. Therefore, the specific, lawful powers of his office are immaterial to a decision of this case. Petitioner is liable for acts done by O'Connell under color of his office, and that his defrauding of Respondent was so perpetrated can be found from conceded and uncontroverted facts.

**(c) If such definition were a question of fact, and material, there was no genuine issue with respect thereto.**

The mere existence of a question of fact, even in the presence of conflicting affidavits or documentary evidence, does not foreclose a summary judgment. The court may examine the evidence, voluminous or scant, and if it is satisfied that there is no genuine issue of fact (or, in other words, if, after a consideration of such evidence, the court would direct a verdict in favor of one or the other of the parties), the court may properly find that there is no such issue as to facts as would prevent the entry of a summary judgment. See *Heart of America Lumber Co.* v. *Belove*, 28 Fed. Supp. 619 (D. C., W. D. Mo.) and 111 Fed. (2d) 535 (CCA-8th), for an example of the aforesaid rule.

We submit that there is in this case no genuine issue as to the authority or official duties of said Chief Security Examiner. A detailed discussion of the evidence to demonstrate the correctness of that contention would be inappropriate in this brief. The Circuit Court of Appeals,

after mature consideration of all the evidence submitted by affidavit and stipulation and of the aforesaid ruling of the Illinois State Civil Service Commission, determined that under no circumstances could said Chief Security Examiner be said not to have authority to accept the deposit of security by an employer seeking to qualify as a self-insurer. Therefore, the entry of a summary judgment for Respondent is proper.

We feel that we have met and answered on the merits the contention of Petitioner that the Circuit Court of Appeals, contrary to the Rules of Civil Procedure, has decided a genuine issue as to a material fact in a summary judgment proceeding, but we feel constrained to mention that Petitioner raised that objection for the first time in this proceeding in its petition for rehearing filed with the Circuit Court of Appeals. Despite the fact that the alleged lack of authority of the Chief Security Examiner was asserted by Petitioner as one ground for the granting of its motion for summary judgment and was one of the main points of discussion in the briefs and oral arguments of both parties to the appeal, Petitioner did not point out to the District Court or the Circuit Court of Appeals the presently asserted disability of the Court to decide that point until after the Circuit Court of Appeals had rendered its opinion. Petitioner chose to speculate upon the outcome of the appeal taken by Respondent, hoping that the Circuit Court of Appeals would sustain the judgment erroneously given to Petitioner by the District Court. Having lost on that gamble, Petitioner attacked and now attacks the power of the Court to decide against it. Speculation of that character should avail Petitioner nothing.

II.

**The Industrial Commission of Illinois Had and Has the Power to Accept Deposits of Security From Applicants Seeking to Become Self-Insurers.**

A single reading of Section 26(a) of the Illinois Workmen's Compensation Act (Illinois Revised Statutes, 1943, Ch. 48, Par. 163), as quoted at page 19 of Petitioner's Brief, will suffice to show conclusively that the Illinois Industrial Commission has been granted the power to accept from an employer a deposit of security or to accept other indemnity or a bond in lieu of requiring the employer to insure his entire liability for compensation provided by the Act. Section 26(a) specifically states that "if the sworn [financial] statement of [the] employer does not satisfy the commission [of the employer's financial ability to pay future compensation awards] * * *, the commission shall require such employer to * * * furnish security, indemnity or a bond guaranteeing the payment by the employer of the compensation provided for in [the] Act, or * * *."

It is also apparent that the deposit of that security or the furnishing of the indemnity or bond may be made with or to the Commission itself. That conclusion flows naturally from the language used and there is no limitation of that language elsewhere in the Section or in the Act.

Petitioner has repeatedly attempted to use Rule 39 of the Illinois Industrial Commission, quoted at pages 19 and 20 of its Brief, to limit and destroy the plain meaning of Section 26 of the Act. We again submit, and will patiently demonstrate anew, that this not only is not so but cannot be so.

By the provisions of Section 26 of the Workmen's Compensation Act, (Illinois Revised Statutes, 1943, Ch. 48,

Par. 163), each employer subject to the Act is required to file with the Industrial Commission "a sworn statement showing his financial ability to pay the compensation provided for in [the] Act." If the statement filed satisfies the Commission as to his financial ability, the employer need do nothing more; he is deemed a self-insurer (Sec. 26(a) (1)). If he fails to file the required statement, or if the statement filed does not so satisfy the Commission, he must do one of two things. He may "insure his entire liability to pay such compensation in some insurance carrier * * *" (Sec. 26(a) (3)), or, if he does not wish to do that, he may, with the concurrence of the Commission,

> "Furnish security, indemnity or a bond guaranteeing the payment by the employer of the compensation provided for in this Act, or (Sec. 26(a) (2)),
>
> "Make some other provision, satisfactory to the industrial commission, for the securing of the payment of compensation provided for in this Act, * * *" (Sec. 26(a) (4)).

If he so qualifies, he is also known as a self-insurer.

Rule 39 of the Commission reiterates the requirement of Section 26(a) (1) that all applicants to become self-insurers shall file a financial statement. The second sentence of that rule creates an additional requirement that no application to become a self-insurer will be entertained "unless the applicant for such privilege shall have deposited in the name of an approved trustee and in an approved depositary a fund sufficient to discharge *all liability that may have accrued by reason of awards for the payment of compensation that have become final on the date of such application*" (R. 55). (Italics supplied.)

It requires only a cursory examination of the statute and the rule to ascertain that Section 26(a), as a whole, and Section 26(a) (2), in particular, relate solely to furnishing security for the payment of future awards of com-

pensation which may be made, and that the second sentence of Rule 39 relates solely to the deposit of a fund to insure the payment of accrued liability on awards of compensation already made. The language used will permit of no other construction or result. Thus, the two requirements complement each other and neither, in any way, conflicts with, or limits or modifies the other.

Petitioner no longer relies upon a direct denial of this inescapable conclusion, but seeks to toss it aside and unfairly to confuse the issues by stating, contrary to the fact, that there was no proof that Respondent's deposit of security was made to secure future awards of compensation, and, to "prove" that the deposit was made to secure accrued awards, Petitioner quotes a provision of the argument under which Respondent's deposit was made which deals with the return of the deposited security and not with the condition of the deposit (Br. 21). The evidence clearly shows that said deposit was made to secure the payment of future awards of compensation. The agreement quoted from specifically provides that the security deposited by Respondent was to be,

> "* * * held by the said Industrial Commission of Ill. as a guarantee for the payment of any judgments entered against the said Pinkerton's National Detective Agency, Inc. for the payment of any sums found by process of law to be due to the employees of the said Pinkerton's Nat'l. Det. Agency, Inc. under a law of the State of Illinois, known as the Workmen's Compensation Law, approved June 28, 1913, and in force July 1, 1913, * * *" (R. 14, 36).

And, after Respondent had elected to and did furnish a satisfactory insurance policy and requested the return of its security, the Chairman of the Commission wrote to it as follows (R. 17):

> "It is the rule of the Commission that collateral is to be held one year from the effective date of insurance policy, injured employees have the right to file claim

> for that period of time. If on May 24th, 1942, there are no claims, awards or judgments of this Commission, against the Pinkerton's National Detective Agency, your collateral will be released at that time."

Plaintiff's contention is at least erroneous.

It would serve no purpose and would unduly lengthen this brief to discuss and answer in detail the arguments advanced by Petitioner at page 22 of its brief. The whimsical character of that argument becomes readily apparent if one bears in mind that Respondent did not qualify nor seek to qualify as a self-insurer upon the mere filing of a financial statement showing ability to meet awards of compensation. Respondent qualified in accordance with Section 26(a) (2) of the Act by depositing security for the payment of future awards of compensation. In addition, the reasoning of the Circuit Court of Appeals branded by Petitioner as fallacious was used by the Court merely to give an extreme example of the results of the unsound position taken by Petitioner.

Petitioner's glancing attack on the constitutionality of Section 26(a) of the Workmen's Compensation Act is likewise without merit and immaterial. In the first place, that question was not properly presented or preserved below. Secondly, it is of no assistance in ascertaining the meaning of Section 26(a) of the Act since the argument made would militate equally against the construction contended for by the Petitioner and that contended for by Respondent. Thirdly, the statute providing for the filing of a bond by the Chief Security Examiner is not assailed and the holding of the Court in *People* v. *Federal Surety Co.*, 336 Ill. 472 is not applicable. Furthermore, if Section 26(a) were unconstitutional, under the rule announced in the *Federal Surety Co.* case, Petitioner's principal, O'Connell, and consequently, Petitioner, would be estopped to deny the validity of its bond.

## III.

### Statute of Limitations.

The shortest period of limitation contended for by Petitioner is five years. Even if the five year statute of limitations is held to apply, the present action is not barred.

The defalcation against which Petitioner assumed liability, as expressed in the bond which it executed, was the failure of its principal, as Chief Security Examiner for the Industrial Commission, to "account for and pay over to the parties entitled thereto, all moneys that shall come into his hands by virtue of said office or employment," and to "account to and turn over to his successor in office, or to such other persons as may be designated by his superior officer, all records, property, money, books and papers and all other property appertaining to his office or employment * * *." (R. 6, 8.)

It is the failure of O'Connell to account for the money or property of Respondent that is the basis of the action brought by Respondent against Petitioner, *Selleck* v. *Selleck*, 107 Ill. 389, 395. That failure occurred at or subsequent to May 24, 1941 when Respondent procured the requisite compensation insurance and first demanded the return of its security (R. 11, 17). Not until that date did a cause of action arise or exist against the surety upon O'Connell's bond. Not until that date could any statute of limitations begin to run. This action, filed July 21, 1942, was in ample time.

## CONCLUSION.

We respectfully submit that Petitioner has shown no cause for the granting of a writ of certiorari and that its petition should be denied.

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